IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 17789 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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USHABEN JITENDRAKUMAR DHOLARIYA - Petitioner(s)

Versus

BHAGVANJIBHAI CHAKUBHAI UGHAD - Respondent(s)

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Appearance :

MR BM MANGUKIYA for Petitioner(s) : 1,
None for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 19/09/2005

ORAL JUDGMENT

1. The petitioner has approached this Court seeking protection of her fundamental rights guaranteed under the Constitution of India, by filing this petition under Article 226 of the Constitution of India. The petitioner

has also mentioned the Code of Civil Procedure, 1908 in the cause title of the petition. But then what is prayed is, 'the Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or writ of certiorari or writ in the nature of certiorari or any other appropriate writ, order or direction, quashing and setting aside the judgement and order passed by the learned Joint District Judge, 3rd Fast Track Court, Gondal in Misc. Civil Appeal No.70 of 2001 dated May 30, 2005.'

2. The reasons for which a writ of certiorari under Article 226 of the Constitution praying for quashing the judgement and order of a subordinate court, are known to either the petitioner herself or her learned counsel. Similarly protection of which “fundamental right” is sought for by this petition, is also not disclosed by the petitioner as the same is not spelt out in the writ petition.

3. The facts of the case are that the name of the petitioner, daughter of one Jitendrakumar Alias Jivraj Kalyan was mutated in Village Form No.6 on 15.05.1979 by Entry No.1032 on the sad demise of her father, who died on 26.10.1977, at that time she was hardly 8 year old. A

copy of the aforesaid entry is produced at Annexure 'C' to this petition. In that document Mr.M.P. Patel is described as guardian of the minor.

It is the case of the petitioner that later on her grand mother sold the land bearing Survey No.170 of Village Station Vavdi admeasuring 11 acres and 29 gunthas which was mutated in her name by a registered sale deed dated 11.09.1979.

This gave rise to filing of a suit being Special Civil Suit No.79 of 1979. The said suit was heard and disposed of by judgement and order dated 26.04.1983. Initially, the suit was filed in the name of the present petitioner, being minor through her mother and natural guardian, Smt. Premila Popatlal Patel. Subsequently, the plaint was amended and mother of the present petitioner was impleaded as co-plaintiff.

The operative part of the judgement and order of the learned Civil Judge (Senior Division), Gondal reads as under:

> “It is hereby ordered and declared that the suit property bearing Survey No.170 admeasuring 11

acres, 29 gunthas of Station Vavdi, Taluka Tejpur as described in para 13 of the plaint is ordered to be partitioned as under:

(a) The share of plaintiff no.1 (present petitioner) is 1 acre, 26 gunthas, i.e. 5/36th share

(b) The share of plaintiff no.2 (mother of the present petitioner) is 1 acre, 25 gunthas,i.e. 5/12th share,

(c) .. ..

(d) .. ..”

Para 33 reads as under:

'33. The plaintiffs are directed to produce certified copy of the decree of the court before the Collector, Rajkot District for effecting actual partition to award possession to the plaintiffs as per the share in respect of the suit property as laid down under the provisions of Order XX, Rule 18(1) read read with section 54 of the Code of Civil Procedure.”

4. Against the Judgement and decree of the learned Civil Judge (Senior Division), the plaintiffs preferred First Appeal No.1328 of 1983 before this Court which was pending until by order dated 20.07.2005 this Court in light of the provisions of sections 15 & 30 of the Gujarat Civil Courts Act, 2005, transferred the same observing that, 'these Appeals stand transferred to the Court of the District Judge concerned for disposal in accordance with law'. The Court also directed the Registry to transfer these appeals as well as the Civil Applications to the District Court concerned at the earliest along with the Record & Proceedings of the trial court, if lying before this Court. The Court was pleased to observe that the ad interim relief, if any, shall continue.

5. During the pendency of the aforesaid appeal before this Court the present petitioner approached the Court of Civil Judge (Junior Division) by filing Regular Civil Suit No.18 of 2001 for various reliefs along with an application for interim injunction. The learned Judge of the trial court by order dated 09.11.2002 granted injunction in favour of the present petitioner-plaintiff restraining the world at large from obstructing the

plaintiff and/ or its agents from entering onto the land bearing Revenue Survey No.170 admeasuring 11 acres, 29 gunthas of Village Station Vavdi.

Being aggrieved of this, the respondent herein-original defendant approached the District Court by filing Misc. Civil Appeal No.70 of 2001. The learned Joint District Judge, 3rd Fast Track Court, Gondal allowed the appeal by judgement and order dated 30.05.2005. The learned First Appellate Judge was pleased to quash and set aside the order passed below Exh.5 in Regular Civil Suit No.18 of 2001 dated 09.11.2001. The learned Judge taking into consideration the facts of the case allowed the appeal with costs.

6. It is against this order that the present Special Civil Application is filed under Article 226 of the Constitution of India praying for protection of fundamental rights. In the considered opinion of this Court this petition is not only misconceived but it is difficult to restrain from branding it as an act of abuse of process of the Court. In fact filing of the Regular Civil Suit before the Civil Judge (Junior Division) itself is an act of abuse of process of court. To

demonstrate that the fresh suit is misconceived and it is an act of abuse of process of court, the order passed by the learned Civil Judge (Senior Division) in Special Civil Suit No.1979 is reproduced hereinabove. From the perusal of the judgement and order of the learned Judge, who has held that the plaintiffs are not in possession of the land in question. The learned Judge directed the plaintiffs to produce the certified copy of the decree and also asked the Registry to forward the same to the collector, Rajkot **for effecting actual partition and to award possession to the plaintiffs** as per the share in respect of the suit property. Not only that the learned Judge was pleased to advise the plaintiffs to file separate application for mesne profits under Order XX, Rule 12 of the Code of Civil Procedure. If possession was with the plaintiffs, there was no question of the Court directing the plaintiffs to file an application for mesne profits. (emphasis supplied)

7. The learned advocate for the petitioner solely on the basis of an entry in Village Form No.6 asserted that the plaintiff-petitioner is in possession and therefore, petitioner has rightly filed the present suit. In this regard the observations of the First Appellate

Court in Misc. Civil Appeal No.70 of 2001 are worth noting.

> “10 It appears from the records that the learned trial judge has not considered the facts that the plaintiff has failed to file an application for interim injunction in Spl. C.S. No.79/ 79. If in real sense the plaintiff was in possession of the suit land and she is the lawful owner of the land then it was her duty to appear before the Civil Court to protect her possession from the defendant. The above stated suit is still pending before the Civil Court, Gondal. Not only that but the Hon'ble High Court has also not passed any preventive order against the defendant in First Appeal No.1328/ 83 and simply the Hon'ble High Court has passed the order against the defendant not to transfer the suit land till the final disposal of the appeal by any manner. <u>If in real sense, the plaintiff was found in possession of the suit land then the Hon'ble High Court will have to pass such order against the defendant</u>, the plaintiff could have applied before the Hon'ble High Court for such relief. .. .. ..”

“11. It appears from the dispute between the parties that the suit for ownership and possession of the agriculture land and the Civil Court, Gondal has passed preliminary decree in favour of the plaintiff which is challenged by the defendant before the Hon'ble High Court which is still pending as undecided in First Appeal. Revenue record of the disputed land is produced by the parties before the trial court suggest that the defendant is in possession of the suit land since long time. There is a deeming provision u/s 135-D of the Bombay Land Revenue Code regarding the possession of the agriculture land. Simply the name of the plaintiff is entered into the revenue record in village from no.7 and 12 for the year of 1995 to 1999. **But there is no any other documents produced by the plaintiff before the trial court**. If we follow the revenue records regarding the entry of records of right then it becomes crystal clear that the defendant is in lawful possession of the disputed land. But how the plaintiff's name is entered into the revenue

record of village form no.7 and 12 is not explained by the plaintiff properly and on this point the finding given by the learned trial judge to believe the possession of the plaintiff is also perverse. .. .."

8. From the aforesaid discussion of the learned First Appellate Judge it is clear that the learned Judge of the trial court has erred in granting Exh.5 application of the plaintiff filed in Regular Civil Suit No.18 of 2001.

9. In the considered opinion of this Court if the petitioner-plaintiff was in possession, she should have prayed for an injunction at the time of filing of Special Civil Suit No.79 of 1979. After the decree was passed when the matter was brought before this Court by way of First Appeal, at that time also a Civil Application would have been filed to continue the interim relief till final disposal of the First Appeal. In the opinion of this Court the petitioner has played smart with the Court by filing separate suit and obtaining an order of injunction from the learned Civil Judge (Junior Division). The learned advocate appearing for the petitioner tried to explain the filing of new suit by saying that if the

petitioner would have filed an application in the earlier proceedings the petitioner would have been told to file a separate suit for a new cause of action and therefore, the petitioner-plaintiff chose to file a separate suit. The Court finds the explanation to be too short to be accepted.

10. In view of the aforesaid discussion the Special Civil Application fails and the same is dismissed. No costs.

(RAVI R. TRIPATHI, J.)

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